

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 Richard Alan King,
13 Defendant/Movant.
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No. CV-16-00086-PHX-SRB
CR-08-00045-PHX-SRB

ORDER

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16 Movant Richard Alan King filed his Motion to Vacate, Set Aside, or Correct
17 Sentence pursuant to 28 U.S.C. § 2255 on January 14, 2016. The Motion was later
18 amended to correct typographical errors. The United States filed its Answer Limited to
19 Affirmative Defenses on October 6, 2017 and King filed his Reply on April 9, 2018. On
20 June 5, 2018 the Magistrate Judge issued his Report and Recommendation
21 recommending that the Motion be denied and dismissed with prejudice. Timely written
22 objections were filed by King and by the United States. The Report and Recommendation
23 also recommended that two pending Motions to Amend be denied. The Magistrate Judge
24 denied King's Motion to Show Cause and Motion for Extension of Time and denied as
25 moot the United States' Motion to Permit It to Respond Only When Ordered.

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GOVERNMENT’S OBJECTION

The Government filed a single objection to the Report and Recommendation. The objection states it was filed solely to preserve the issues in the event of a defense objection or appeal. The objection to the Report and Recommendation is based on its failure to recommend that the Court deny the United States’ petition for the alternative reasons set forth in the response. The objection is overruled. The Court is not required to decide cases on all alternate grounds suggested or argued by the parties.

KING’S OBJECTIONS

King objects to the Report and Recommendation on what the Court considers a frivolous ground, namely, that because there was no specific mention of his reply the Magistrate Judge must not have considered it. According to King both references by the Magistrate Judge to the Amended Motion to Vacate being fully briefed somehow means that the Magistrate Judge did not consider his reply. Following this argument to its logical conclusion, the Magistrate Judge’s failure to mention the Government’s answer would mean that when the Magistrate Judge said the matter was fully briefed he had not considered that either. In this Court’s view when a matter is “fully briefed” that means that the motion, response and reply have been filed and have been considered. King’s objection on the grounds that his reply was not considered is overruled.

King’s next objection is to the Magistrate Judge’s recommendation that his Motion to Amend to add a claim under *United States v. Sanchez-Gomez* be denied. This objection is also a frivolous one in that King does not explain why the Magistrate Judge’s ruling is incorrect. King only claims that it is insufficiently specific and, therefore, he is prejudiced. He claims to have no knowledge of the ruling in *Sanchez-Gomez* but considers it “highly improbable that the Supreme Court would find that the Ninth Circuit does not have jurisdiction to en banc over-rule its former decision.” This is an insufficient objection to the Report and Recommendation of the Magistrate Judge.

King also objects to the Magistrate Judge’s denial of his Motion to Show Cause Why the United States Should Not be Held in Civil Contempt and his Motion for

1 Extension of Time to File Objections to Reports and Recommendations and Replies to
2 any of Respondent's Moving Papers and Magistrate Decisions. While King requests *de*
3 *novo* review of these denials, *de novo* review is not the standard for the Court's review of
4 a non-dispositive order of the Magistrate Judge. An order of a Magistrate Judge on a non-
5 dispositive matter is reviewed by this Court for clear error or decisions contrary to law.
6 Rule 72(a), Fed. R. Civ. P. The Magistrate Judge explained that because the United
7 States had not failed to comply with a court order the Motion for an Order to Show Cause
8 Why the United States Should Not be Held in Civil Contempt cannot stand. This Court
9 agrees. Moreover, there was nothing clearly erroneous or contrary to law in denying
10 King's request for a blanket extension.

11 Finally, King objects to the Magistrate Judge's recommendation denying a
12 Certificate of Appealability and leave to proceed *in forma pauperis* on appeal and cites in
13 support of his objections his motion and reply. Because the Court agrees with the
14 Magistrate Judge's Report and Recommendation that this Court cannot consider his
15 claims of ineffective assistance of counsel and is procedurally barred from considering
16 his claim that could have been, but was not raised on appeal, this objection is also
17 overruled. The Court finds itself in agreement with the Report and Recommendation
18 of the Magistrate Judge.

19 IT IS ORDERED adopting the Report and Recommendation of the Magistrate
20 Judge as the Order of this Court. (Doc. 65)

21 IT IS FURTHER ORDERED that Movant's Amended Motion to Vacate, Set
22 Aside or Correct Sentence is denied and dismissed with prejudice.

23 IT IS FURTHER ORDERED that Movant's Motion to Amend to expand his
24 ineffective assistance of counsel claims is denied. (Doc. 25)


25 IT IS FURTHER ORDERED that Movant's Motion to Amend to add a claim
26 under *United States v. Sanchez-Gomez* is denied. (Doc. 26)

27 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
28 proceed *in forma pauperis* on appeal because dismissal of the Motion is justified by a

1 plain procedural bar and jurists of reason would not find the ruling debatable.

2 IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.

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4 Dated this 2nd day of August, 2018.

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9 Susan R. Bolton
United States District Judge